

1991

Beesley v. Hatch : Brief of Appellee

Utah Supreme Court

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CLERK SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF UTAH

CLAY T. BEESLEY and LaJUANA
BEESLEY,

Plaintiffs,

v.

DELL RANSOM HATCH, DELL F.
HATCH, JOAN HATCH, JODEL
VENTURES TRUST, ENCINOSA
ENTERPRISES, BERNICE LEHMAN,
and COREY S. MOGELBERG and
WINFERD SPENDLOVE,

Defendants,

BRIEF OF THE APPELLEE

Appeal No. 910298

WINFERD SPENDLOVE,

Counterclaimant,

vs.

CLAY T. BEESLEY and LaJUANA
BEESLEY,

Plaintiffs,

Argument Priority
Classification: 16

WINFERD SPENDLOVE,

Crossclaimant, and Appellee,

vs.

JODEL VENTURES TRUST, DELL F.
HATCH, Trustee, COREY S.
MOGELBERG, BERNICE LEHMAN,
ENCINOSA ENTERPRISES, DELL
HATCH, Trustee, DELL RANSOM
HATCH and DEE SUPPLY, INC.

Cross-Defendants and Appellants,

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	iv
JURISDICTION OF THE SUPREME COURT OF UTAH	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES .	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENTS	6
ARGUMENTS	7
I. THE PROPERTY WHICH IS THE SUBJECT OF THIS CASE CONSTITUTES A SINGLE PARCEL, GIVEN THE DEALINGS OF THE PARTIES	7
II. A SHERIFF'S SALE OF REAL PROPERTY, RESULTING FROM JUDICIAL FORECLOSURE PROCEEDINGS, IS GOVERNED BY THE SPECIFIC STATUTORY PROVISIONS ON JUDICIAL FORECLOSURES, INCLUDING THE JUDGMENT OF THE COURT AND ITS ORDER OF SALE	9
III. THE SHERIFF'S SALE OF THE SUBJECT PROPERTY WAS CONDUCTED IN ACCORDANCE WITH THE NUNC PRO TUNC DEFAULT JUDGMENT AND THE COURT'S ORDER OF SALE	12
IV. APPELLANTS HAVE FAILED TO CARRY THE BURDEN OF PROOF REQUIRED TO SUPPORT AND JUSTIFY THE SETTING ASIDE OF THE SHERIFF'S SALE	13
V. THE COURT SHOULD DISMISS THIS APPEAL BASED UPON THE APPELLANTS' FAILURE TO MEET THE PROCEDURAL REQUIREMENTS OF THE UTAH RULES OF APPELLATE PROCEDURE AND THEIR FAILURE TO MARSHAL THE EVIDENCE	15
CONCLUSION	18

* * * * *

ADDENDUM ATTACHED

ADDENDUM A: UTAH CODE ANNOTATED §§ 78-37-1 and 6 (1987)

ADDENDUM B: UTAH RULE OF CIVIL PROCEDURE 69(e)(3)

ADDENDUM C: TRUST DEED (RI at 15)
ADDENDUM D: NUNC PRO TUNC DEFAULT JUDGMENT (RII at 194)
ADDENDUM E: ORDER OF SALE (RII at 236)
ADDENDUM F: MINUTE ENTRY, MAY 14, 1991 (RII at 303)

* * * * *

KEY TO ABBREVIATIONS

RI Trial Court Record, Volume I
RII Trial Court Record, Volume II

TABLE OF AUTHORITIES

<u>CONSTITUTION, STATUTES, AND COURT RULES</u>	<u>Page No.</u>
Utah Code Annotated, § 57-1-27 (1990)	3, 4
Utah Code Annotated, § 78-2-2(3)(j) (1987 & Supp. 1991) . . .	1
Utah Code Annotated, § 78-37-1 (1987)	9, 12
Utah Code Annotated, § 78-37-6 (1987)	10
Utah Rule of Civil Procedure 52(a)	2
Utah Rule of Civil Procedure 69(e)(3)	10
Utah Rules of Appellate Procedure 6	15
Utah Rules of Appellate Procedure 9	17
Utah Rules of Appellate Procedure 11(e)	15, 16
 <u>CASES</u>	
<u>Aetna Life Ins. v. Slack</u> , 756 P.2d 1140 (Mont. 1988) . . .	14
<u>Berube v. Fashion Centre, Ltd.</u> , 771 P.2d 1033 (Utah 1989) . .	1
<u>Bawden and Associates v. Smith</u> , 646 P.2d 711, 714 (Utah 1982)	8
<u>Brooks v. Department of Emp. Sec.</u> , 736 P.2d 241 (Utah 1987)	17
<u>Commercial Bank of Utah v. Madsen</u> , 236 P.2d 343 (Utah 1951)	8, 9
<u>Gate City Federal Savings & Loan Association v. Dalton</u> , 808 P.2d 1117 (Utah App. 1991)	1
<u>Guardian State Bank v. Humphreys</u> , 762 P.2d 1084 (Utah 1988)	16
<u>Horton v. Gem State Mutual of Utah</u> , 794 P.2d 847 (Utah App. 1990)	2, 16, 17
<u>In re Estate of Bartell</u> , 776 P.2d 885 (Utah 1989)	17
<u>Mendez v. State Dept. of Social Services</u> , 813 P.2d 1234 (Utah App. 1991)	1
<u>Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles</u> , 681 P.2d 1258, 1264 (Utah 1984)	15
<u>Mower v. Bohmke</u> , 337 P.2d 429 (Utah 1959)	14

<u>Peterson Plumbing Supply v. Bernson</u> , 797 P.2d 473 (Utah App. 1990)	1
<u>Reeves v. Gentile</u> , 813 P.2d 111 (Utah 1991)	1
<u>Sampson v. Richins</u> , 770 P.2d 998 (Utah App), <u>cert. denied</u> 776 P.2d 916 (Utah 1989)	16
<u>State v. Nine Thousand One Hundred Ninety-Nine Dollars</u> , 791 P.2d 213 (Utah App. 1990)	16
<u>Walton v. Walton</u> , 814 P.2d 619 (Utah App. 1991)	2

TEXTS

55 Am. Jur. 2d <u>Mortgages</u> § 650 (1971)	12
55 Am. Jur. 2d <u>Mortgages</u> § 653 (1971)	11
55 Am. Jur. 2d <u>Mortgages</u> § 656 (1971)	14

JURISDICTION OF THE SUPREME COURT OF UTAH

The provisions of Utah Code Annotated, Section 78-2-2(3)(j)(1987 and Supp. 1991), inasmuch as this Appeal requires the review of an order of a "court of record over which the Court of Appeals does not have original appellate jurisdiction."

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE PROPERTY WHICH IS THE SUBJECT OF THIS CASE CONSTITUTES A SINGLE PARCEL, GIVEN THE DEALINGS OF THE PARTIES. The standard of review is an independent review for correctness, without deference to the conclusions of law entered by the trial court. Gate City Federal Savings & Loan Association v. Dalton, 808 P.2d 1117 (Utah App. 1991); Peterson Plumbing Supply v. Bernson, 797 P.2d 473 (Utah App. 1990).

II. WHETHER A SHERIFF'S SALE OF REAL PROPERTY, RESULTING FROM JUDICIAL FORECLOSURE PROCEEDINGS, IS GOVERNED BY THE SPECIFIC STATUTORY PROVISIONS ON JUDICIAL FORECLOSURES, INCLUDING THE JUDGMENT OF THE COURT AND ITS ORDER OF SALE, OR THE GENERAL PROVISIONS OF THE RULES OF CIVIL PROCEDURE GOVERNING EXECUTION SALES. The standard of review is an independent review for correctness, without deference to the statutory interpretation of the trial court. Mendez v. State Dept. of Social Services, 813 P.2d 1234 (Utah App. 1991); Reeves v. Gentile, 813 P.2d 111 (Utah 1991); Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

III. WHETHER THE SHERIFF'S SALE OF THE SUBJECT PROPERTY WAS CONDUCTED IN ACCORDANCE WITH THE NUNC PRO TUNC DEFAULT JUDGMENT

AND THE COURT'S ORDER OF SALE. The standard of review is whether the factual findings of the trial court were clearly erroneous. Walton v. Walton, 814 P.2d 619 (Utah App. 1991); Utah Rule of Civil Procedure 52(a).

IV. WHETHER APPELLANTS HAVE ADEQUATELY CARRIED THE BURDEN OF PROOF NECESSARY TO SUPPORT AND JUSTIFY THE SETTING ASIDE OF THE SHERIFF'S SALE. The standard of review is whether the factual findings of the trial court were clearly erroneous. Walton v. Walton, 814 P.2d 619 (Utah App. 1991); Utah Rule of Civil Procedure 52(a).

V. WHETHER THIS APPEAL SHOULD BE DISMISSED BASED UPON THE APPELLANTS' FAILURE TO MEET THE PROCEDURAL REQUIREMENTS OF THE UTAH RULES OF APPELLATE PROCEDURE AND THEIR FAILURE TO MARSHAL THE EVIDENCE. The standard of review is an independent application of the Rules of Appellate Procedure to the facts of this case. Horton v. Gem State Mutual of Utah, 794 P.2d 847 (Utah App. 1990).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Citations and complete reproduction of constitutional provisions, statutes, ordinances, and rules, wherever appropriate, will occur in the text of the brief. Such provisions are also reproduced in the Addendum.

STATEMENT OF THE CASE

This Appeal arises from an Order of the Fifth Judicial District Court, granting Appellee's Motion for Deficiency Judgment and denying Appellant's Motion to Set Aside Sheriff's Sale. The

issues which are pertinent to this appeal stem from the Cross-Claim of Appellee, which Cross-Claim constituted proceedings for judicial foreclosure of a trust deed and trust deed note. (RI at 15)

On the 19th day of January, 1990, a Nunc Pro Tunc Default Judgment was entered in favor of Appellee, and against Appellants, foreclosing a trust deed on the subject property as a note and mortgage. (RII at 194) Said Nunc Pro Tunc Default Judgment was stipulated to by the Appellants, as evidenced by the approving signature of their attorney, Stanford Nielson. (Id.)

The Fifth Judicial District Court, the Honorable Robert L. Newey, executed an Order of Sale on November 15, 1990, in which the Court instructed the Washington County Sheriff to sale the foreclosed property, as described and set forth in the Nunc Pro Tunc Default Judgment, at public auction. (RII at 236)

Said sheriff's sale was noticed up in accordance with Rule 69 of the Utah Rules of Civil Procedure and conducted on December 21, 1990. (RII at 240-259)

At the time of the sale, Appellant Dell F. Hatch appeared and requested that the property be sold by parcels pursuant to Utah Code Annotated, Section 57-1-27. However, said provisions, specifically applicable to Trustee's Sales, did not apply to the Sheriff's sale which was being conducted pursuant to a judicial foreclosure as a mortgage.

Appellee and his counsel, instructed the Deputy Sheriff conducting the sale to go forward with the sale as ordered by the Court in the Nunc Pro Tunc Default Judgment and Order of Sale,

selling the property as described in the Nunc Pro Tunc Default Judgment.

The Deputy Sheriff conducted the sale in accordance with the Court's Order of Sale, selling the property as a single parcel. The sale resulted in purchase of the property by Appellee in the amount of \$75,000.00, as reflected in the Sheriff's Certificate of Sale and the Real Estate Order of Sale Return. (RII at 240-259)

Thereafter, on March 4, 1991, Appellee filed a Motion for Deficiency Judgment and for Attorney's Fees, together with a Notice of Hearing setting hearing on this motion for March 12, 1991. (RII at 260-269) At the March 12, 1991, hearing, Appellant Dell F. Hatch made his appearance, pro se, and advanced arguments based upon Utah Code Annotated § 57-1-27, dealing with Trustee's Sales. (RII 270-278) The Court explained to Mr. Hatch that this statutory authority was not dispositive since the sale was a sheriff's sale stemming from a judicial foreclosure of a trust deed. The Court extended Mr. Hatch ten (10) days from the date of hearing to submit points and authorities supporting his objection. (RII at 270)

Appellee filed a Notice to Submit for Decision on March 28, 1991, when Mr. Hatch had failed to submit any points and authorities supporting his objection to Appellee's Motion for a Deficiency Judgment. (RII at 279)

On April 1, 1991, Appellants, through counsel, filed a Motion to Set Aside Sheriff's Sale. (RII at 282) Appellee filed a Memorandum of Points and Authorities in Opposition to the Motion to Set Aside Sheriff's Sale on April 8, 1991. (RII at 288)

After a continuance of hearing on April 24, 1991, both the Motion for Deficiency Judgment and Motion to Set Aside Sheriff's Sale came before the Court for hearing on May 14, 1991. The Court heard arguments of counsel and testimony from Dell F. Hatch, after which the Court concluded that the Sheriff's Sale was a judicial foreclosure sale and not an execution sale, that the Judgment and Order of Sale directed that the property be sold in one parcel and not in separate parcels, that the Sheriff's Sale was conducted in accordance with the Judgment and Order of Sale, and that the separate parcel arguments of Appellants were never raised in the court proceedings or prior to the date of the Sheriff's Sale. The Court also concluded that, based upon the testimony received and Appellants' failure to produce evidence to the contrary, the sale was fair and that the Appellants were not prejudiced thereby. Consequently, the Court granted Appellee's Motion for Deficiency Judgment and denied Appellant's Motion to Set Aside. (RII at 303 and 307)

Within 30 days after entry of the Order for Deficiency Judgment, Appellants filed their Notice of Appeal, commencing these appellate proceedings. (RII at 310) Other than the timely filing of their Notice of Appeal, Appellants have been deficient or late in meeting every other procedural rule in these proceedings. This includes failure to file a bond for costs on appeal, as required by Rule 6 of the Utah Rules of Appellate Procedure, failure to order a transcript as required by Rule 11(e) of the Utah Rules of Appellate Procedure, failure to file a docketing statement within

21 days after filing their Notice of Appeal, as required by Rule 9 of the Utah Rules of Appellate Procedure (Appellant's Docketing Statement was filed on or about August 26, 1991), and failure to timely file a brief, although Appellants apparently received approval for extension of time and for leave to file a late brief. As of the date of Appellee's Brief, no copies of the motions or orders for extension or the leave to file a late brief have been received by Appellee.

SUMMARY OF ARGUMENTS

I. Throughout all of the dealings between Appellee and Appellants the subject property has been treated as one parcel. This includes all dealings at the time of sale, the description in the original Trust Deed and all four subsequent amendments to the Trust Deed, in all court proceedings, including the Nunc Pro Tunc Default Judgment, stipulated to by the Appellants, and the Court's Order of Sale. The property has never been described as anything but one parcel and the dealings of the parties indicate that the property should be treated as a single parcel.

II. Utah's specific statutory provisions governing a Sheriff's sale of real property, resulting from a judicial foreclosure, require that the Sheriff sell the property in accordance with the Court's Judgment and Order of Sale. These specific provisions take precedence over the general provisions of the Rules of Civil Procedure on execution sales, referred to by the statute.

III. The Sheriff's sale was conducted in accordance with

the Nunc Pro Tunc Default Judgment the Court's Order of Sale stemming from Appellee's judicial foreclosure of the trust deed.

IV. Appellants failed to present evidence or to otherwise show that the price received at the sale was unfair or that they were injured by the conduct of the sale. Consequently, Appellants have failed to carry the burden of proof required for the setting aside of the Sheriff's Sale.

V. Appellants have failed to meet the procedural requirements of the Utah Rules of Appellate Procedure as it relates to the ordering of a transcript, the posting of a bond and timely filing of the docketing statement and the brief. In addition, Appellants have failed to marshal the evidence. Such procedural deficiencies justify dismissal of this appeal.

ARGUMENTS

I.

THE PROPERTY WHICH IS THE SUBJECT OF THIS CASE CONSTITUTES A SINGLE PARCEL, GIVEN THE DEALINGS OF THE PARTIES.

Appellee Winferd Spendlove sold a single parcel of real property to Appellant Jodel Ventures Trust and took a security interest in that parcel by execution of a trust deed and trust deed note. (RI at 15) The trust deed and trust deed note described the property as one parcel. (RI at 15) The original trust deed note was amended on four separate occasions, adding additional Appellants as trustors, but with no change in the description of the property--each and every document describes the property as a single parcel. Appellants subsequently defaulted on the obliga-

tions under the trust deed note and its amendments, and Appellee undertook foreclosure of the trust deed by judicial foreclosure. Appellee is entitled, insofar as possible, to complete foreclosure proceedings against the security in its original form.

In Commercial Bank of Utah v. Madsen, 236 P.2d 343 (Utah 1951), the Court found that even though land was described as lots 1 and 2, such a description "does not serve to make separate tracts of an otherwise unified parcel." In that case the Court found that although the property was described in separate parcels, it was perceived by the parties, through their dealings, to be one parcel. The bank prepared and accepted a mortgage of this property as one parcel; in its' pleadings, judgment, notice of sale and throughout the entire proceeding it was treated by the bank as one parcel of property." Id. at 345. Furthermore, in Bawden and Associates v. Smith, 646 P.2d 711, 714 (Utah 1982) (quoting Glenn on Mortgages, vol. 1, § 88.1), the Utah Supreme Court, said, "[T]here must be as many sales, or to put it more roughly, as many decrees, as there are separate mortgages."

In the subject case, there has always been only one trust deed and throughout all of the dealings between Appellee and the Appellants, this property has been treated as one parcel. This includes all dealings at the time of sale, where the property was sold as one parcel and Appellee took a trust deed and note on the property as one parcel, in all subsequent amendments to the Trust Deed, in all court proceedings, including the Nunc Pro Tunc Default Judgment, stipulated to by the Appellants, and in the Court's Order

of Sale. The property has never been described or treated by the parties as anything but one parcel. In addition, the necessity for treatment of the subject property as a single parcel is greater than the circumstances in Commercial Bank, since the property in this case has never been described as anything other than one parcel.

A determination that the property involved in this case is a single parcel is compelled by the circumstances and the dealings of the parties and the fact that only one trust deed was given to secure the Appellants' obligations. Such a determination defeats any arguments of Appellants that the property should have been sold in separate parcels.

II.

A SHERIFF'S SALE OF REAL PROPERTY, RESULTING FROM JUDICIAL FORECLOSURE PROCEEDINGS, IS GOVERNED BY THE SPECIFIC STATUTORY PROVISIONS ON JUDICIAL FORECLOSURES, INCLUDING THE JUDGMENT OF THE COURT AND ITS ORDER OF SALE

This appeal raises no issues as to the general procedural requirements of notice and conduct of a sheriff's sale, it appearing that all such procedures were met in full. Appellants only contention is that the sheriff should have sold the subject property in parcels upon the request of Appellant Dale F. Hatch, at the time of the sheriff's sale. Utah Code Annotated §78-37-1 (1987), provides as follows:

There can be one action for the recovery of any debt or the enforcement of any rights secured solely by mortgage on real estate which action must be in accordance with the provisions of this chapter. Judgment shall be

given adjudging the amount due, with costs and disbursements, and the sale of mortgaged property, or some part thereof, to satisfy said amount and accruing costs, and directing the sheriff to proceed and sale the same according to the provisions of law relating to sales on execution, and a special execution or order of sale shall be issued for that purpose.

Rule 69 of the Utah Rules of Civil Procedure sets forth Utah's general "provisions of law relating to sales on execution." Rule 69(e)(3), speaking of the conduct of an execution sale, states that "when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; . . . the judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels or of articles which can be sold to advantage separately, and the officer must follow such directions."

In the context of a mortgage foreclosure, it is somewhat unclear whether Rule 69 of the Utah Rules of Civil Procedure provides the exclusive requirements for sales by parcels, particularly in light of the specific provisions of the Utah Code on mortgage foreclosures. Utah Code Annotated § 78-37-6 (1987), specifically states that "[i]n all sales of real estate under foreclosure the Court may determine the parcels and the order in which such parcels of property shall be sold." (Emphasis added). These provisions dictate that the Court has the specific right and authority to determine whether the property should be sold in parcels or in masse and to determine the order in which any parcels

should be sold, which is exactly what the trial court has done.

In the instant case, Appellee's mortgage foreclosure of a trust deed (RI at 15), describing the property as a single parcel, resulted in a Nunc Pro Tunc Default Judgment, approved by Appellants and signed by the Court, in which the subject property was described as a single parcel. (RII at 194) In addition, the trial court instructed the sheriff that "the real property described in said judgment and decree of foreclosure be sold at public auction." (RII at 237-38) In granting Appellee his Motion for Deficiency Judgment and in denying Appellant's Motion to Set Aside Sheriff's Sale, the trial court acknowledged that the Sheriff's Sale had been conducted in accordance with the Nunc Pro Tunc Default Judgment and the Order of Sale.

Upon review of the record and the proceedings in the trial court, it is clear that the trial court issued a Judgment of foreclosure and an Order of Sale, and appropriately instructed the sheriff to sell the property as a single parcel, consistent with the description of the property in the underlying trust deed. (RI at 15) As a general rule, "it has been recognized that where the mortgage or trust instrument describes the property as a single unit, the property is subject to sale as a whole upon foreclosure." 55 Am Jur 2d Mortgages, § 653 (1971).

In order to comply with the request of Appellants, the sheriff would have been required to disregard the specific description of the property in the Nunc Pro Tunc Default Judgment and violate the court's Order of Sale instructing the sheriff to

sell the property as described in the trust deed and Nunc Pro Tunc Default Judgment.

It makes no sense for application of the pertinent statutory provisions and procedural rules to lead to such a dilemma, which is exactly what Appellants ask this Court to require. However, it is recognized in the area of mortgage foreclosures that "[t]he court may give explicit instructions to the office making the sale as to the mode and amount of mortgaged property to be sold, in which case such direction is binding upon the officer." 55 Am. Jur. 2d Mortgages § 650 (1971).

The trial court properly exercised its specified authority under Title 78, Chapter 37, Utah Code Annotated, the sheriff sold the property in accordance with the Judgment and Order of Sale and the completed sale was valid and should not be set aside.

III.

THE SHERIFF'S SALE OF THE SUBJECT PROPERTY WAS CONDUCTED IN ACCORDANCE WITH THE NUNC PRO TUNC DEFAULT JUDGMENT AND THE COURT'S ORDER OF SALE

As it relates to mortgage foreclosures, Utah Code Annotated § 78-37-1 provides in pertinent part "[j]udgment shall be given adjudging the amount due, with costs and disbursements, and the sale of mortgaged property, or some part thereof, to satisfy said amount and accruing costs, and directing the sheriff to proceed and sale the same according to the provisions of law relating to sales on execution, and a special execution or order of

sale shall be issued for that purpose." This statute mandates that the sheriff's sale be conducted in accordance with the Judgment of the court and the court's instructions as set forth in the Order of Sale.

In the instant case, the Nunc Pro Tunc Default Judgment and the Court's Order of Sale instructed the sheriff to sell the property as described therein, which was as one parcel. (RII at 194 and 236) The Nunc Pro Tunc Default Judgment was approved by the Appellants and their counsel without any request or other indication that a sale by separate parcels should be undertaken. (RII at 194) Likewise, the Court's Order of Sale was issued without objection by the Appellants. Appellants' efforts to set aside the Sheriff's sale came too late and are not consistent with specific Utah statutes governing Sheriff's sales in judicial foreclosure proceedings.

The property was sold at the Sheriff's sale as a single parcel, just as it was described in the Trust Deed and Nunc Pro Tunc Default Judgment and just as the Sheriff was instructed to sell the property by the Court's Order of Sale.

IV.

APPELLANTS HAVE FAILED TO CARRY THE BURDEN OF PROOF REQUIRED TO SUPPORT AND JUSTIFY THE SETTING ASIDE OF THE SHERIFF'S SALE

The Utah Courts have expressed an unwillingness to set aside sheriff's sales absent a showing by the proponent that the sale was unfair, fraudulent, or that the proponent was otherwise injured by the sale. Based upon this established standard, the

proceedings in this case dictate that the sheriff's sale be upheld.

In Mower v. Bohmke, 337 P.2d 429 (Utah 1959) the Court stated that "[t]he policy of the Courts is to uphold judicial sales except when they are manifestly unfair. . . especially this is true in a state such as Utah which has a substantial period of redemption." Id at 55. In addition, the Court stated that "[i]n the instant case Defendant has presented no evidence to show that the price was unfair or that Defendant was injured by the conduct of this sale." Id. See also, Aetna Life Ins. v. Slack, 756 P.2d 1140 (Mont. 1988) (sale en masse, rather than parcels, not abuse where no showing that higher price would result from sale by parcels). See generally 55 Am. Jur. 2d Mortgages § 656 (1971) (en masse sale of mortgaged property will not be disturbed unless it is shown that the sale was fraudulent or that the mortgagor or owner was damaged thereby).

These same arguments apply to the instant case and the same standard of proof is required of the Appellants, particularly where the Appellants stipulated to the Nunc Pro Tunc Default Judgment and raised no objections to the Court's Order of Sale prior to the Sheriff conducting the sale. In addition, the trial court found that Appellants failed to present any evidence that the price received at the sale was unfair or that they were injured by the conduct of the sale.

V.

THE COURT SHOULD DISMISS THIS APPEAL BASED UPON THE APPELLANTS' FAILURE TO MEET THE PROCEDURAL REQUIREMENTS OF THE UTAH RULES OF APPELLATE PROCEDURE AND THEIR FAILURE TO MARSHAL THE EVIDENCE.

Aside from the filing of the Notice of Appeal, Appellants are and have been deficient in following all other rules, procedures and deadlines required by the Utah Rules of Appellate Procedure.

Rule 6 of the Utah Rules of Appellate Procedure requires that a bond for costs on appeal shall be filed at the time of filing the Notice of Appeal. As of the date of this Brief, Appellants have not filed a bond for costs on appeal and no supersedeas bond has been filed, despite the mandate of Rule 6 and the existence of a Deficiency Judgment exceeding \$57,000.00. As stated by this Court in Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258, 1264 (Utah 1984), failure to file an appeal bond may be grounds for dismissal of an appeal in appropriate circumstances. Given Appellants' non-compliance with the procedural rules for appeals and the existence of a substantial Deficiency Judgment, this case constitutes the "appropriate circumstances" referred to by the Court.

Rule 11(e) of the Utah Rules of Appellate Procedure requires that the Appellant request a transcript from the reporter within ten days after the filing of the notice of appeal, or if certain parts of the record are not to be requested, that a certificate to that effect be filed with the trial and appellate courts. As of the date of this Brief, Appellants have failed to

request any portion of the proceedings not on file, including a transcript from the May 14, 1991, hearing, upon which their appeal is based and have failed to file a certificate as set forth in Rule 11(e).

It is Appellants' burden to show that the trial court erred in its granting of Appellee's Motion for Deficiency Judgment and its denial of Appellants' Motion to Set Aside Sheriff's Sale. Absent the transcript from the trial court proceedings, the record is devoid of the arguments, testimony and evidence presented at the hearing and the reasoning of the trial court in making its ruling. In light of the incomplete record before the Court, it must be presumed that the trial court's ruling was based on sufficient facts and evidence. State v. Nine Thousand One Hundred Ninety-Nine Dollars, 791 P.2d 213 (Utah Ct. App. 1990); Horton v. Gem State Mutual of Utah, 794 P.2d 847 (Utah Ct. App. 1990); Sampson v. Richins, 770 P.2d 998 (Utah App), cert. denied 776 P.2d 916 (Utah 1989). Consequently, Appellants cannot meet the burden required to set aside the trial court's decision, particularly as it relates to the trial court's factual finding that the Sheriff's Sale was fair and non-prejudicial to Appellants, upon which the applicable standard of review is "clearly erroneous." See supra Argument IV and accompanying text.

In addition, Appellants have defeated one of the major purposes of Rule 11(e), which is to avoid the Court having to attempt a recreation of the arguments advanced by counsel during the trial court hearing. Guardian State Bank v. Humphreys, 762

P.2d 1084 (Utah 1988).

Rule 9(a) of the Utah Rules of Appellate Procedure requires that a docketing statement be filed with the Appellate Court within 21 days after the Notice of Appeal. Appellants' Notice of Appeal was filed on June 24, 1991, while their Docketing Statement was mailed and apparently filed with the Court on or about August 26, 1991. Consequently, Appellants were over 30 days late in filing their Docketing Statement. "Docketing statements must fully comply with Rule 9." Brooks v. Department of Emp. Sec., 736 P.2d 241 (Utah 1987). Appellants have failed to fully comply with this rule.

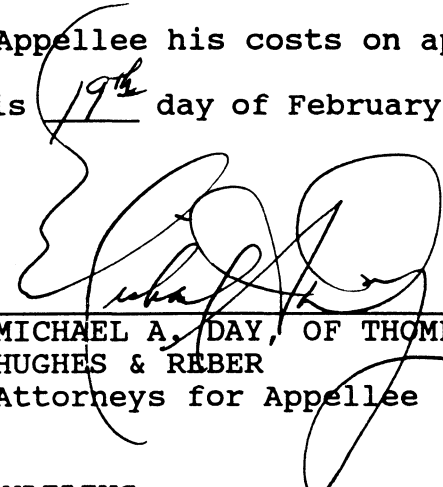
The foregoing facts and circumstances clearly establish Appellants' disregard and non-compliance with the Utah Rules of Appellate Procedure. Appellants have not only ignored the deadlines established by these rules, but have failed to undertake certain procedures to insure the integrity and completeness of the record and to serve the other policy concerns underlying those procedures. Although it might be argued that any one of Appellants' abuses, taken by itself, does not warrant dismissal, the cumulative non-compliance of Appellants supports and justifies such a dismissal.

Furthermore, Appellants have failed to marshal the evidence supporting the findings of the court and to demonstrate that the findings are so lacking in support as to be clearly erroneous. Horton v. Gem State Mutual of Utah, 794 P.2d 847 (Utah App. 1990); In re Estate of Bartell, 776 P.2d 885 (Utah 1989).

CONCLUSION

Based upon the facts of this case, the foregoing arguments and application of statutes, rules and authorities, Appellee respectfully requests that the Supreme Court of Utah affirm the decision of the Fifth Judicial District Court, finding the Sheriff's Sale to be valid. In the alternative, Appellee requests that this Court dismiss the appeal based upon the failure of Appellants to observe the requirements of the Utah Rules of Appellate Procedure and for Appellants' failure to marshal the evidence relating to the trial court findings. Additionally, Appellee asks that the Court award Appellee his costs on appeal.

RESPECTFULLY SUBMITTED this 19th day of February, 1992.

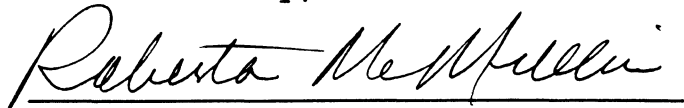


MICHAEL A. DAY, OF THOMPSON,
HUGHES & REBER
Attorneys for Appellee

AFFIDAVIT OF MAILING

I hereby certify that four (4) full, true and correct copies of the above and foregoing **BRIEF OF THE APPELLEE** was placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid on the 19 day of February, 1992, addressed as follows:

Stanford Nielson
Attorney at Law
3760 Highland Drive, Suite 200
Salt Lake City, UT 84106



ADDENDUM A: UTAH CODE ANNOTATED §§ 78-37-1 and 6 (1987)

CHAPTER 37

MORTGAGE FORECLOSURE

Section	Section
78-37-1. Form of action — Judgment — Special execution.	78-37-6. Right of redemption — Sales by parcels — Of land and water stock.
78-37-2. Deficiency judgment — Execution.	78-37-7. Repealed.
78-37-3. Necessary parties — Unrecorded rights barred.	78-37-8. Restraining possessor from injuring property.
78-37-4. Sales — Disposition of surplus moneys.	78-37-9. Attorney fees.
78-37-5. Sales — When debt due in installments.	

78-37-1. Form of action — Judgment — Special execution.

There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging the amount due, with costs and disbursements, and the sale of mortgaged property, or some part thereof, to satisfy said amount and accruing costs, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution, and a special execution or order of sale shall be issued for that purpose.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-37-1; L. 1965, ch. 172, § 1. **Cross-References.** — Execution and proceedings supplemental thereto, Rule 69, U.R.C.P. Trust deeds, § 57-1-19 et seq.

MORTGAGE FORECLOSURE

78-37-6

78-37-6. Right of redemption — Sales by parcels — Of land and water stock.

Sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in case of sales under executions generally. In all cases where the judgment directs the sale of land, together with shares of corporate stock evidencing title to a water right used or intended to be used, or suitable for use, on the land, the court shall equitably apportion such water stock to the land, or some part thereof, in one or more parcels, as it may deem suitable for the sale thereof, and the land and water stock in each parcel shall be sold together, and for the purpose of such sale shall be regarded as real estate and subject to redemption as above specified. In all sales of real estate under foreclosure the court may determine the parcels and the order in which such parcels of property shall be sold.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-37-6. **Cross-References.** — Redemption from execution sale, Rule 69(f), U.R.C.P.

ADDENDUM B: UTAH RULES OF CIVIL PROCEDURE 69(e)(3)

Rule 69. Execution and proceedings supplemental thereto.

(e) Proceedings on sale of property.

(3) **Conduct of sale.** All sales of property under execution must be made at auction to the highest bidder, between the hours of 9 o'clock a.m. and 5 o'clock p.m. After sufficient property has been sold to satisfy the execution no more shall be sold. Neither the officer holding the execution nor his deputy shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery it must be within view of those who attend the sale, and it must be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. All sales of real property must be made at the courthouse of the county in which the property, or some part thereof, is situated. The judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the officer must follow such directions.

ADDENDUM C: TRUST DEED (RI at 15)

WHEN RECORDED, MAIL TO:

SOUTHERN UTAH TITLE COMPANY (Escrow Dept.)

P. O. Box 190

St. George, Utah 84770

Space Above This Line For Recorder's Use

TRUST DEED

With Assignment of Rents

THIS TRUST DEED, made this 18th day of April, 1980
between DELL F. HATCH, Trustee of the JODEL VENTURES TRUST
as TRUSTOR,
whose address is 1747 Minden Drive Salt Lake City, Utah 84770
(Street and number) (City) (State)
SOUTHERN UTAH TITLE COMPANY, a Utah Corporation
as TRUSTEE,* and
WINFERD SPENDLOVE
as BENEFICIARY,

WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST,
WITH POWER OF SALE, the following described property, situated in WASHINGTON
County, State of Utah:

BEGINNING at the South 1/4 Corner of Section 10, Township 42 South, Range 13 West, SLB&M and running thence North along the Center Section line 1308.4 feet; thence East 666.0 feet; thence South parallel to the Center Section line 1308.40 feet more or less to the South line of said Section 10; thence West along the South line of Section 10, 666.0 feet to the point of beginning.

TOGETHER with all improvements and appurtenances thereunto belonging.
SUBJECT to Easements, Rights of way and Restrictions of Record and those enforceable in law and equity.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$77,000.00, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

E.L.H. A

TO PROTECT THE SECURITY OF THIS TRUST DEED, TRUSTOR AGREES:

1. To keep said property in good condition and repair; not to remove or demolish any building thereon, to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon; to comply with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to do all other acts which from the character or use of said property may be reasonably necessary; the specific enumerations herein not excluding the general; and, if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees:

- (a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and
- (b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged.

3. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

5. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property; to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

6. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

7. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby.

IT IS MUTUALLY AGREED THAT:

8. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

9. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof; (d) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph.

10. As additional security, Trustor hereby assigns Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Trust Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

11. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

12. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

13. The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default.

14. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof, and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing

15. After the lapse of such time as may then be required by law following the recording of said notice of default, and notice of default and notice of sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold); at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 10% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

16. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

17. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

18. This Trust Deed shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Trust Deed, whenever the context requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

19. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

20. This Trust Deed shall be construed according to the laws of the State of Utah

21. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

Signature of Trustor

THE JODEL VENTURES TRUST

BY:

DELL F. HATCH

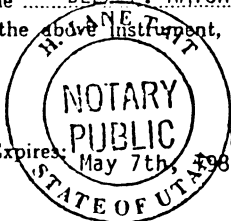
Trustee

(If Trustor an Individual)

STATE OF UTAH
COUNTY OF WASHINGTON

On the 18th day of April, A.D. 1980, personally

appeared before me DELL F. HATCH Trustee of THE JODEL VENTURES TRUST, the signer(s) of the above instrument, who duly acknowledged to me that they executed the same.



My Commission Expires May 7th, 1983

H. LANE TAIT

Notary Public residing at:

St. George, Utah 84770

(If Trustor a Corporation)

STATE OF UTAH
COUNTY OF ss.

On the day of , A.D. 19, personally

appeared before me , who being by me duly sworn,

says that he is the of ,

the corporation that executed the above and foregoing instrument and that said instrument was signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution

of its board of directors) and said acknowledged to me that said corporation executed the same.

Notary Public residing at:

My Commission Expires:

ADDENDUM D: NUNC PRO TUNC DEFAULT JUDGMENT (RII at 194)

'90 JAN 24 PM 3 35

RONALD W. THOMPSON, #3242
BARBARA G. HJELLE, #4597
THOMPSON, HUGHES & REBER
Attorneys for Defendant Spendlove
148 East Tabernacle
St. George, Utah 84770
Telephone: (801) 673-4892

CLERK
DEPUTY *[Signature]*

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY
STATE OF UTAH

CLAY T. BEESLEY and
LaJUANA BEESLEY,

Plaintiffs,

vs.

DELL RANSOM HATCH, DELL F.
HATCH, JOAN HATCH, JODEL VENTURES
TRUST, ENCINOSA ENTERPRISES,
BERNICE LEHMAN, COREY S. MOGELBERG,
and WINFERD SPENDLOVE,

Defendants,

WINFERD SPENDLOVE,

Counterclaimant,

vs.

CLAY T. BEESLEY and LaJUANA
BEESLEY,

Plaintiffs,

WINFERD SPENDLOVE,

Cross-Claimant,

vs.

JODEL VENTURES TRUST, DELL F.
HATCH, Trustee, COREY S.
MOGELBERG, BERNICE LEHMAN,
ENCINOSA ENTERPRISES, DELL HATCH,
Trustee, DELL RANSOM HATCH and
DEE SUPPLY, INC.,

Cross-Defendant.

NUNC PRO TUNC
DEFAULT JUDGMENT

Civil No. 88-2248

*sent
rec
496-501*

IN THIS ACTION Cross-defendants Jodel Ventures Trust, Dell F. Hatch, Corey S. Mogelberg, Bernice Lehman, Encinosa Enterprises, Dell Ransom Hatch and Dee Supply, Inc., having been served with process and having failed to answer Defendant Spendlove's Third Amended Crossclaim filed herein; and Cross-defendants' default having been duly entered by the Clerk of the Court; and Defendant Spendlove having submitted a Motion for Default Judgment for the relief requested in Defendant Spendlove's Third Amended Crossclaim; and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and hereby is, entered against Cross-defendants Jodel Ventures Trust, Dell F. Hatch, Corey S. Mogelberg, Bernice Lehman, Encinosa Enterprises, Dell Ransom Hatch and Dee Supply, Inc., for the relief requested in Defendant Spendlove's Third Amended Crossclaim as follows:

1. Cross-claimant Winferd Spendlove is granted judgment against Cross-defendant Jodel Ventures Trust, Dell F. Hatch, Trustee, on the trust deed and note hereinafter described, in the principal sum of \$76,624.45, together with interest thereon in the sum of \$23,989.58 to and including January 5, 1990, together with such additional interest as may accrue through the end of the month of sale, at the rate of \$20.933 per diem; together with attorney's fees in the sum of \$12,253.50 and costs in the sum of \$666.25; together with delinquent property taxes for the years 1986 through 1989 in the sum of \$4,196.66, together with penalties and accruing interest, for a total judgment of \$117,730.44 as of January 6, 1990.

2. The issue of attorney's fees is to remain open in the event that Cross-claimant Spendlove's counsel desires to re-petition this Court for an award for additional costs and expenses incurred on Cross-claimant Spendlove's behalf subsequent to this judgment.

3. That certain trust deed made and executed and between Cross-claimant Spendlove and Cross-defendants Jodel Ventures Trust, Dell F. Hatch, Corey S. Mogelberg, Bernice Lehman, Encinosa Enterprises, Dell Ransom Hatch, dated April 18, 1980, and recorded in the office of the Washington County Recorder, State of Utah, in Book 270, at pages 872-874, and the promissory note, dated April 18, 1980, executed by Cross-defendants Jodel Ventures Trust, Dell F. Hatch, Corey S. Mogelberg, Bernice Lehman, Encinosa Enterprises, Dell Ransom Hatch, for the purpose of securing their indebtedness, as amended, constitute a good, valid, and first lien upon the following-described real property situated in Washington County, Utah, to-wit:

BEGINNING at the South 1/4 Corner of Section 10, Township 42 South, Range 13 West, Salt Lake Base and Meridian, and running thence North along the Center Section line 1308.4 feet; thence East 666.0 feet; thence South parallel to the Center Section line 1308.40 feet, more or less, to the South line of said Section 10; thence West along the South line of Section 10, 666.0 feet to the point of beginning.

4. The said trust deed and note and the lien thereof are hereby foreclosed as a note and mortgage.

5. The above-described real property shall be sold by the Sheriff of Washington County in accordance with law and the practice of this Court, and the proceeds of such sale shall be applied first to satisfaction of the sheriff's costs, disbursements, and commissions, and then to Cross-claimant Spendlove or his attorney for the accrued and accruing costs of this action, then to Cross-claimant Spendlove's attorney for the sum fixed as attorney's fees, then the amount owing to Cross-claimant Spendlove for principal, interest, costs and expenses, taxes, and assessments, as set forth above, together with accrued interest thereon, and Cross-claimant Spendlove's accruing

costs, or so much of said sums as said proceeds will pay, and that the surplus, if any, should be accounted for and paid over by the Sheriff to the Clerk of this Court, subject to this Court's further order.

6. Any party may purchase at said sale.

7. If a deficiency results after application of the proceeds of said sale and foreclosure, as hereinabove provided, then Cross-claimant Spendlove shall be entitled to have and recover a judgment against Cross-defendants Jodel Ventures Trust, Dell F. Hatch, Trustee, for the full amount of said deficiency.

8. The Sheriff shall issue his certificate of sale to the purchaser and his Sheriff's deed to the holder thereof upon the expiration of the period of redemption.

9. The holder of the certificate of sale shall receive the rents and income from the premises during the period of redemption.

10. The interest or lien, if any, of Plaintiffs Beesley in and to the subject premises, except the following described two acre parcel, is inferior, junior and subordinate to Cross-claimant Spendlove's interest in the subject premises:

BEGINNING at a point on the center section line, said point being north 0°12'39" East 1046.72 feet along said center section line from the South Quarter corner of Section 10, Township 42 South, Range 13 West, of the Salt Lake Base and Meridian, and running thence South 89°27'22" East 666.00 feet parallel with the South line of the Southeast quarter of Section 10; thence North 0°12'39" East parallel with center section line 130.84 feet; thence North 89°27'22" West 666.00 feet parallel with said South section line to the center of section line; thence South 0°12'39" West 130.84 feet along said center section line to the point of beginning.

11. The interest or lien, if any, of Cross-defendants Dell F. Hatch, Corey S. Mogelberg, Bernice


Lehman, Encinosa Enterprises and Dell Ransom Hatch, is inferior, junior and subordinate to Cross-claimant Spendlove's interest in the subject premises.

12. The grantee under the Sheriff's deed shall be let into possession of the premises and have all proper process of this Court to maintain possession thereof, and, upon issuance of said Sheriff's deed, all right, title, and interest of Cross-defendants Jodel Ventures Trust, Dell F. Hatch, Corey S. Mogelberg, Bernice Lehman, Encinosa Enterprises, Dell Ransom Hatch, and each of them, in and to the above-described property shall be forever barred and foreclosed.


13. Furthermore, in the event Plaintiffs obtain a judgment against Defendant Spendlove, Defendant Spendlove is entitled to a judgment to a judgment for a like amount by way of indemnity of behalf of Spendlove against Cross-defendants Jodel Ventures Trust, Dell F. Hatch, Corey S. Mogelberg, Bernice Lehman, Encinosa Enterprises, Dell Ransom Hatch.

DATED this 19th day of January, 1990.

BY THE COURT:


J. PHILIP EVES
District Court Judge

APPROVED AS TO FORM:



Stanford Neilson
Attorney for Dell Ransom
Hatch, Dell F. Hatch, Joan
Hatch, Jodel Ventures Trust,
Encinosa Enterprises, Bernice
Lehman and Corey S. Mogelberg

CERTIFICATE OF MAILING

I hereby certify that on the 24TH day of January, 1990, I mailed a true and correct copy of the foregoing NUNC PRO TUNC DEFAULT JUDGMENT, postage prepaid, to the following:

Stanford Nielson
3760 Highland Drive, #200
Salt Lake City, Utah 84106

Clay & LaJuana Beesley
2085 South 700 West
Rt. 1, Box 130-4
Hurricane, Utah 84737

A handwritten signature in cursive script, reading "Sandra Byrd", is written over a horizontal line.

ADDENDUM E: ORDER OF SALE (RII at 236)

THOMPSON, HUGHES & REBER
Ronald W. Thompson (Bar No. 3242)
Barbara G. Hjelle (Bar No. 4597)
Michael A. Day (Bar No. 5463)
Attorney for Defendant Spendlove
148 East Tabernacle
St. George, Utah 84770
Telephone: (801) 673-4892

NOV 15 1990

Michael A. Day

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

CLAY T. BEESLEY and LaJUANA BEESLEY,

Plaintiffs,

vs.

DELL RANSOM HATCH, DELL F. HATCH, JOAN
HATCH, JODEL VENTURES TRUST, ENCINOSA
ENTERPRISES, BERNICE LEHMAN, COREY S.
MOGELBERG, and WINFERD SPENDLOVE,

Defendants.

ORDER OF SALE

Civil No. 88-2248

WINFERD SPENDLOVE,

Counterclaimant,

vs.

CLAY T. BEESLEY and LaJUANA BEESLEY,

Plaintiffs,

WINFERD SPENDLOVE,

Cross-Claimant,

vs.

JODEL VENTURES TRUST, DELL F. HATCH,
Trustee, COREY S. MOGELBERG, BERNICE
LEHMAN, ENCINOSA ENTERPRISES, DELL
HATCH, Trustee, DELL RANSOM HATCH and
DEE SUPPLY, INC.,

Cross-Defendant.

901430006

THE STATE OF UTAH TO THE SHERIFF OF WASHINGTON COUNTY, UTAH,
GREETINGS:

WHEREAS judgment was rendered by the above-entitled Court in Washington County, State of Utah, on the 19th day of January, 1990, in favor of Cross-Claimant, Winferd Spendlove, and against Cross-Defendants, Jodel Ventures Trust, Dell F. Hatch, Trustee, Corey S. Mogelberg, Bernice Lehman, Encinosa Enterprises, Dell Hatch, Trustee, and Dell Ranson Hatch, in the principal sum of \$76,624.45, together with interest thereon in the sum of \$23,989.58 to and including January 5, 1990, together with such additional interest as may accrue through the date of sale at the rate of \$20.93 per day, together with attorney's fees in the sum of \$12,253.50 and costs in the sum of \$666.25, with the issue of attorney's fees being left open for inclusion of additional fees and costs incurred subsequent to judgment, together with delinquent property taxes for the years 1986 through 1989 in the sum of \$4,196.66, together with penalties and accruing interest, for a total judgment of \$117,730.44 as of January 6, 1990; and

WHEREAS Judgment and Decree of Foreclosure was duly filed and docketed in the Clerk's office, and a certified copy of the said Judgment and Decree of Foreclosure is attached hereto and by this reference made a part hereof; and

WHEREAS no payments have been made toward said judgment, and the whole amount of the same is still due and owing;

IT IS ORDERED, ADJUDGED, AND DECREED that the real property described in said Judgment and Decree of Foreclosure be

sold at public auction.

NOW, THEREFORE, you, the Sheriff of Washington County, Utah, are hereby commanded and required to proceed to notice for sale, and to sell the premises described in said Judgment and Decree of Foreclosure and apply the proceeds of said sale as directed in the Judgment and Decree of Foreclosure, and you shall make and file your report of such sale with the Clerk of this Court within 60 days from date of your receipt thereof, and you shall do all things according to the terms and requirements of said Judgment and Decree of Foreclosure, and the applicable provisions and requirements of law.

EXECUTED this 15th day of November, 1990.


DISTRICT COURT JUDGE

ADDENDUM F: MINUTE ENTRY, MAY 14, 1991 (RII at 303)

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

CIVIL DIVISION

IMINAL
FILE NO: 880502248

CLAY T BEESLEY LAUJUANA BEESLEY	vs.	DELL RANSOM HATCH X DELL F. HATCH, JOAN HATCH, et al
Plaintiff		Defendant
Appeared <input type="checkbox"/>		Appeared <input type="checkbox"/>

PRO SE	RONALD W. THOMPSON BARBARA G. HJELLE MICHAEL A. DAY X STANFORD NIELSON X
Attorney	Attorney
Appeared <input type="checkbox"/>	Appeared <input type="checkbox"/>

DGE: J. PHILIP EVES REPORTER: PAUL G. McMULLIN

ERK: L. WILLIAMSON BAILIFF: C. FLOWERS

PROCEEDING: MOTION FOR DEFICIENCY JUDGMENT AND MOTION TO SET ASIDE SHERIFF'S SALE

MINUTE ENTRY

Mr. Day and Mr. Neilson present and
Mr. Nielson heard as to Motion to Set
Aside Deficiency Judgment with Mr. Day
heard in opposition to same. Both counsel
stipulate that there is a deficiency
judgment and the Sheriff's sale was valid.
Mr. Dell F. Hatch sworn and testified
under direct examination by Mr. Neilson
and no cross by Mr. Day, witness steps
down. Counsel heard in response and

MINUTE ENTRY

rebuttal. The Court heard and stated this
was a foreclosure sale not an execution
sale and the Court directed the sale of
the property in one parcel not in separate
parcels and the issue was never raised as
to separate parcels. This issue should
have been raised prior to the Sheriff sale.
The Court finds the sale to be fair, Motion
to Set Aside denied. Motion for Deficiency
Judgment granted, but will be held in back
of file for 5 days before signing by the Court.

Minute Book No. NN Page No. 163 Date: May 14, 1991

proved: _____

303